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## **Mapping the Public –Private Law Divide: A hybrid approach to corporate accountability**

Hackett, C., & Moffett, L. (2016). Mapping the Public –Private Law Divide: A hybrid approach to corporate accountability. *International Journal of Law in Context*, 12(3), 312-336.  
<https://doi.org/10.1017/S1744552316000239>

**Published in:**  
International Journal of Law in Context

**Document Version:**  
Peer reviewed version

**Queen's University Belfast - Research Portal:**  
[Link to publication record in Queen's University Belfast Research Portal](#)

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# Mapping the Public –Private Law Divide: A hybrid approach to corporate accountability

## I. Introduction

Holding multinational corporations (MNCs) responsible for harm caused to private individuals and groups has often seen such victims resort to traditional common law redress in tort. Actions brought under the Alien Torts Claim Act (1789) have seen a swathe of cases against MNCs (*Doe v Unocal*, 2002; *AMZ et al v Total*, 2007). In light of the *Kiobel* (2013) case, the age of extra-territorial claims, at least against foreign violations and companies in the US, is at an end. That said, the private law redress system was imperfect: challenges with statute of limitations barring claims (*Girca v IBM*, 2006); lack of local judicial infrastructure or expertise to bring a domestic claim in developing countries (Human Rights Watch, 1999; Zerk, 2014, p. 49); difficulties establishing liability of parent companies for violations committed by subsidiaries; characterisation of gross violations of human rights as torts or delicts (Zerk, 2014, 45; Moffett, 2014, p. 10); and inadequate remedy of damages where MNCs are found responsible for violations (Malamud-Grosi and Grosman, 2006, p. 545). We suggest exploring what can be learnt from public international law through an international reparations court, given the private law challenges in capturing the scale of such violations, the responsibility of MNCs and effective remedies to victims.

Although a number of complementary perspectives on corporate accountability, such as sanctions and regulations, exist, this article concentrates on the lesser-discussed remedial aspect. We focus on remedies for victims or affected external stakeholders from human rights violations arising from a corporation's behaviour that is either in breach of obligations or does not sit well with endeavours to act in a responsible manner. Human rights discourse typically makes reference to victims, whereas in corporate governance literature, local communities or those affected by corporate environmental disaster are more likely to be referred to as 'external stakeholders'. It is in marrying these two areas of law (ultimately speaking about the same issues) that this article is situated. While this article discusses the energy extractive industry in particular - due to its high profile impact on individuals (such as the Deepwater Horizon spill), communities, and the environment - the points raised are applicable to other industries responsible for gross violations of human rights. Our concern for those affected by the energy extractive industry is heightened by structural limitations, as such individuals and communities are often the most marginalised and vulnerable groups in a country, with little political power, such as indigenous groups. Most of the world's natural resources are located in traditionally 'lesser developed regions' in development narratives (Frank, 1991). Many of these countries can be dependent on foreign direct investment for growth and development; this, in addition to limited laws, regulations

and policies, characterises an underdeveloped accountability framework in ensuring robust regulations at a regional and national level.

In public international law there has been a general trend since the Second World War that has seen the advancement of human rights law, and to a lesser extent, international criminal justice. This period has witnessed a proliferation of international and regional courts to adjudicate on violations committed by states and individuals. The attention to international monitoring and compliance through international courts is due to states' inability or unwillingness to effectively redress issues and violations that are of an international concern, such as gross violations of human rights. With the rise in power of non-state actors, such as MNCs and non-state armed groups, violations committed by such entities can fall outside the capacity and willingness of the state to hold them to account and the traditional state-centric international human rights bodies, unless individual leaders are brought before international criminal justice mechanisms.

We propose an international reparations court that can hold states, multinational corporations and other non-state actors responsible for violations which shock the conscious of humanity. While the International Criminal Court has been established to address individual criminal responsibility of those most heinous international crimes, there is an accountability gap for violations that fall outside the Court's jurisdictional parameters and capacity. An international reparations court would be more victim-centered, enabling redress for violations perpetrated by collective entities, rather than individuals. It would overcome the pitfalls of private litigation occurring in a number of countries against MNCs, offering victims a more discrete mechanism to tackle the complex evidential, procedural and jurisdictional challenges of atrocities facilitated and perpetrated by non-state actors.

This article begins by exploring the responsibility of multinational corporations through the lenses of corporate social responsibility and international law, before discussing the bridging of these two legal regimes through the quasi private-public development of the Guiding Principles on Business and Human Rights. The subsequent section examines remedies in public law for violations committed by multinational corporations, how these are constructed against the state and how the accountability gap can be better addressed through an international court of reparations, which can hold states and corporations alike responsible for gross violations of human rights. It is hoped that a discussion of remedies for such abuses can contribute to a more coherent accountability of corporations through the examination of remedies that is not pigeonholed into the private/public law dichotomy.

## **II. Responsibility of Multinational Corporations**

MNCs are a product of the Western orientated capitalist liberal model, their power increasing exponentially since the Cold War. As the wealth and power of these corporations develop, states' power to regulate MNCs has comparatively weakened. This is due to the ability of corporations to

operate across borders; while mechanisms by which their behaviour is regulated remains grounded at national or federal levels. With the apparent power shifts at a global level between business and states, there is an increasing demand for corporations to offer more to society than profit accumulation for shareholders. This section will address how corporations *themselves* aim to be responsible actors in society, before considering international laws that may be used (with varying degrees of success) to hold corporations to account if they fail to fulfil their responsibilities/obligations to society. Finally, this section will consider the 2011 Guiding Principles on Business and Human Rights (Ruggie Principles), the most recent guidelines in place to reframe state and business responsibility, and the remedies that may be invoked where they breach their obligations.

### A. Corporate Social Responsibility

CSR is featured primarily within Anglo-American governance systems and as such this article focuses primarily on the Anglo-American scholarship in the area (McBarnet, 2005, p. 205). Originally designed by companies as a means of self-regulation, it is increasingly used by corporations as a way to contribute to the social good of the region in which it operates and to an extent, avoid more rigorous government level regulation. In recent years, there has been a move, in some jurisdictions, to regulate the scope and extent of CSR activities through, for example: US state level constituency statutes and industry level standards (such as the International Council of Mining and Metals). This has been met with varied degrees of success. Mostly, this remains closely aligned to the ‘light- touch’ regulatory characteristics of the usually Anglo, but also American, governance regime. Throughout this piece, reference is made to both the Anglo and American regimes (and their associated understanding and regulation of CSR style practice). We tend to focus primarily on the Anglo-version of CSR for reasons outlined below. The potential of CSR has been lauded by many, with Carroll (1999, p.292) noting that it, ‘has a bright future, because, at its core, it addresses and captures the most important concerns of the public regarding business and society relationships.’ As the idea of CSR has developed it has begun to embrace a wider protection of rights, including human rights. This article therefore seeks to explore the routes by which MNCs can be held accountable for their damaging activities within the extractive industries in particular.

Ideas of individual responsibility are well documented (Collins and Hoyt, 1972). Within the context of human rights abuses by corporations, the limitations of individual responsibility mechanisms lie in the small number of human rights violations that amount to crimes within the context of individual responsibility; notably ‘true atrocities’ such as genocide, war crimes and crimes against humanity (Ratner and Abrams, 2001). Less developed, and more controversial, is the concept of collective responsibility associating blame with a group and situating moral responsibilities in the collective actions taken by these groups. Some questions do arise around whether the components (individuals) have the same value set individually as collectively in order to be a robust moral agent of the group. When looking at the corporation, the *value* set is to produce profit. This is a universal and primary

aim of the group – producing profit for shareholders. Another (lesser) aim is protecting stakeholders/victims from corporate action/abuses. Thus this becomes a value of the corporation (usually articulated through CSR policies) and it is one to which they can be held to account. Corporations are ideal candidates for this understanding of collective responsibility given the structural organisation of the company with an identifiable moral agent (the board) and articulated group intentions (profit/CSR/sustainable development etc.). It is within this understanding of the relationship between human rights and CSR that this debate can be situated. Corporations must be held collectively responsible for human rights infringements, as human rights and related protections are articulated within a company's CSR policy – therefore, a *value* set of the company. Thus, we advocate an understanding of responsibility for human rights violations under the collective responsibility of the corporation.

CSR can, and has been used as an accountability mechanism when companies do not meet their responsibilities. Increasingly included within this are human rights issues. However, the language around and regulation of CSR is vague, particularly so when talking about remedying corporate abuses or indeed when CSR has failed. Existing laws focus on punishing the company rather than offering a remedy to the victim. This section of the article therefore addresses CSR as an accountability mechanism, as well as how it is characterised and complemented within the Extractive industries, finishing with a focus on the tentative relationship between CSR and remedies. It becomes despairingly clear that despite a plethora of CSR literature and attempts to evolve and revolutionize the concept; a multitude of codes, principles, standards laws and regulations; those who suffer the most from corporate abuses are those left inadequately protected by the industry solution to the 'social' role of the corporation in light of these governance shifts.

This subsection will address the evolution of CSR, and how it can be understood through a range of inter-disciplinary interpretations of business, globalisation and the global system. Whereas we recognise that much has been written in this area as it relates to global regulatory governance, global administrative law and societal constitutionalism, we believe that a consideration of the interplay between companies responsibilities as articulated by their CSR policy and human rights protections is timely given the discussions emerging post the UN Guiding Principles on Business and Human Rights. With the article's focus on the energy extractive industries, we will use this sector as a base to understand both the development of CSR as it relates to human rights, and its shortcomings. These criticisms will be centred particularly round the idea that CSR provides corporations with tools to legitimise their actions and activities in the region in which they operate – the 'licence to operate'. Although recognising the flaws of the Anglo-American conceptualisation of CSR, we posit that due to EU communication embracing the Anglo trajectory of CSR (2011), it is necessary to consider how *this* manifestation of CSR can be best used to protect from human rights violations. Traditionally, the norms and laws that bound nation-states, were not extended to corporations (Teubner, 2004, p.3). In

apparent recognition of the shift in governance structures, there is a move towards ‘an interplay between national, international, public and private law systems in allocating and competing for regulatory power’ (Backer, 2006, p.288). The 2003 Norms enlist MNCs as agents of international law implementation (Backer, 2006, p.294). This is evident in both soft and hard law mechanisms discussed below through the lens of the energy extractive industries, and in particular the Extractive Industries Transparency Initiative (EITI).

### 1. The evolution of CSR

CSR has evolved according to market needs and requirements; aligning with market patterns and through societal interpretations of the concept. As a result, a distinct evolutionary trajectory can be traced from early inceptions of the philanthropic businessman (as lauded by Bowen, 1953; Friedman 1970 and notable in the judgment of *Dodge v Ford Motor Company*, 1919; *Hutton v West Cork Railway*, 1883) to the more self-regulatory functions of the company together with the inclusion of the ‘public interest’ into corporate decision making. Indeed, the increased role of business within the wider governance sphere has meant that the lines between business, government and society have become increasingly blurred leading to an increased expectation that the corporation will commit to stakeholders beyond the bottom line of profit maximisation.

The failure to concretely define the concept has allowed for this shift to occur, with common understandings of CSR described as “the social responsibility of business encompasses the economic legal, ethical and discretionary expectations that society has of organisations *in any given point in time*” (Carroll, 1979, p. 500 emphasis added); to an action that *appears* to further some social good (McWilliams and Siegel, 2001) to the benchmark of the socially conscious business movement (Carroll, 2015, p. 87). This is both the measure of, and the failure for the effectiveness of CSR as a concept – it is able to adapt to new pressures placed by each generation – hence the shift in the last number of years in the relationship between CSR and human rights and also to the sustainability movement but it does mean that concerns around legitimacy and accountability arise insofar as the concept becomes somewhat ‘tortured’ (Godfrey et al, 2010) prompting a number of criticisms.

As the concept evolved so too did the criticisms of CSR. Key criticisms that have typically tortured the CSR ideology have included the fact that the company, for the benefit of the company, has designed CSR policies. Taking this a bit further, the purpose of a corporation is profit maximisation. A ‘social’ benefit can only ever be to secondary to the primary aim of capital return, as without capital return, the corporation cannot survive. This suggests then that there are tiers of responsibility within the corporation: the primary responsibility is to shareholders and profit (the economic responsibility outlined by Carroll, 1979); the secondary responsibility is to what management literature typically refers to as internal stakeholders (employees, supply chains etc.) and their responsibilities as shaped by the law (and thus the legal responsibilities outlined by Carroll); and finally, the tertiary responsibility is to external stakeholders such as local communities, governments, media and the

environment. This is the more philanthropic or ethical angle of Carroll's triangle and although some developments have occurred both within the soft-law angle and more concrete responsibilities, the 'value' of these to the company can be measured on the impact that the plight of these stakeholders will have on the shareholders. Indeed, although existing laws and regulations do recommend certain sanctions against the corporation for corporate failures, a key trend is the failure to offer any concrete guarantees of remedy to the affected stakeholder- especially within this tertiary group of responsibilities. Further, the blurring of the line between CSR and PR has led to some problems for CSR. The BP oil disaster in the Gulf of Mexico has highlighted that the admission of responsibility is no longer enough for consumers in order to assuage the company's accountability. Companies need to be doing something to right the wrong they, or their agents, have created. Providing a remedy to the victim for their action or inaction is one way that this can be achieved.

Themes permeated the evolution of CSR including for example, the definitional era in the 1960s, to the empirical studies of the 1970s, to the role of corporate citizenship and corporate social performance in the 1980s and 1990s. Today, the role of business within human rights, together with the impact of the MNC on the environment has commanded the interest of academics and practitioners alike. One such industry facing criticism and commentary on both these fronts (human rights failures and environmental concerns) has been the Energy Extractive Industry – the focus of this article.

## 2. Characterising CSR within the Energy Extractive Industry

As CSR has evolved, so too has the manner in which CSR is regarded within the governance sphere. In analysing the language used by NGOs and not-for-profits, Blowfield alludes to a conceptual shift in both the requirements of business in society and the role of business within governance: 'CSR is now intertwined with international development and related goals of poverty alleviation and sustainability' (2005, p. 515) As CSR becomes an ever more integral part of the corporate governance structure, and as corporate governance is incorporated within the governance discourse, in tandem with theories around the Third Way in particular (Giddens, 1998, 1999, 2001; Wheeler, 2002), there is now an increased participation by non-state actors in the designing and shaping of public policy (Shamir, 2011, p. 314). In this section we speak of issues such as corruption, transparency, and non-compliance with environmental or other standards within the corporate sphere. Whereas we recognise that these are not necessarily gross human rights violations in themselves, we note that *from* these type of issues human rights violations *may* emerge as side-effects or as a consequence to irresponsibility in other areas.

Indeed, headline incidents within the Energy and Extractive Industries have motivated the evolution of CSR from Brent Spar (1995) prompting the launching of the social investment movement to the blood diamonds campaign (due to its relationship with civil wars) leading to the proliferation of corporate codes of conduct (See, Global Witness; The Kimberly Process; Grant and Taylor, 2004).

The use of CSR within the extractive industries sector has a number of functions for the corporation which have been eloquently presented by Watt (2005, s.9.21): a) it appeases key stakeholders that may be prepared to boycott the corporation on social or environmental grounds; b) attracts investment both from mainstream and ethically motivated investors; c) gives the corporation a social licence to operate; d) offers a way to consult with civil society; e) improves public relations through an enhanced public image and finally; f) acts as a counterweight to the more threatening prospect of mandatory regulation and the use, until very recently, of innovative mechanisms such as the Alien Torts Act. Even though (d) above notes the way that CSR can be used to consult civil society, it does not suggest that CSR offers any protection (in terms of a remedy) for those who have been affected by the irresponsible corporation.

Despite the self-regulatory nature of CSR, the concept has been complemented with initiatives at an international level including (on a general level), the UN Centre for TNCs' Draft Code of Conduct for TNCs; ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy; UN Commission on Trade and Development; OECD Guidelines for Multi-National Enterprises and most recently the UN Principles on Business and Human Rights which is discussed at length below. In addition, the Global Sullivan Principles, Social Accountability Standards and the Global Compact (amongst others) all provide the corporation with an intricate network of standards to draw from as they design their own approach to CSR.

As well as the general guidelines, specifics are also available depending on the industry and these serve as more stringent accountability mechanisms. Regarding extractive industries for example, 'rules' in the form of critical litigation and prosecution threats come from the US, in particular, the Foreign Corrupt Practices Act (FCPA) (1977). In the UK, some protection is also offered via the Bribery Act (2010) albeit the new offence created by s.7 seems to be more lenient than FCPA on companies and more accepting of 'mistakes'. The effectiveness of the FCPA in particular was evident in the case of Triton Energy (1997), Baker Hughes (2007), and Halliburton and KBR (2009). Whilst ensuring the payment of fines and holding corporations to account, the impact on stakeholders and those detrimentally affected by the behaviour of the corporation appears to have a lesser focus within the Securities and Exchange Commission's aims and objectives. Despite increased participation of some non-state actors, the mechanisms by which to hold corporations to account and to provide a remedy to the affected stakeholder, are still either non-existent or relatively immature, requiring human rights activists and lawyers to use more innovative means (such as the Alien Tort Claims Act and mass tort actions) to obtain redress. In short, where CSR fails, there are, as yet, no wholly effective accountability mechanisms to which victims can seek justice.

The energy extractive industry has faced intense scrutiny, with well-publicised disasters in the Gulf of Mexico (*Re Deepwater Horizon II and III*, 2014), Alaska (*Exxon Shipping Co. v Baker*, 2008), and



Nigeria (United Nations Environment Programme, 2011), to name but a few. The range and depth of these issues question the effectiveness of the CSR agenda. Yeoman (2004), in interpreting Bakan (2004), reflects that the oil industry in particular has emerged as an important test case for the credibility of meaningful CSR (see also, Watt, 2005). This is true especially when documenting the pathway of cases as affected stakeholders seek remedies for instances when the corporation has failed to act responsibly. High profile cases, intense media commentary, and indeed, the role in popular culture are testament to the importance of the provision of concrete remedies beyond the propaganda of corporate CSR policies.

More recently, there appears to be a drive to encourage more transparency within the sector. Compounding this scrutiny has been the emergence of the Extractive Industries Transparency Initiative (EITI), 'a global coalition of governments, companies and civil society working together to improve openness and *accountable* management of revenues from natural resources.' A good example of a soft law initiative, it *may* have far reaching repercussions on the accountability of corporations. It requires countries to produce a report of the revenues that they have received from corporations due to the management of natural resources. They also sign up to comply with the EITI standard (by 2015 over half of signed up countries had met the 2011 reporting requirements although not yet necessarily 2013 reporting requirements compliant). Genasci and Pray (2008) note that the root cause of problems within the extraction sector can be traced to a lack of government accountability, namely a lack of government accountability due to a focus on collecting resource 'rents' as opposed to taxing what is extracted and that transparency in the flow of funds between governments and corporations would enhance government accountability. With the Multi-Stakeholder group – comprised of public-private cooperation - overseeing the EITI implementation, as well as developing the country work-plan and producing the EITI report, we *may* see some positive developments. In enhancing transparency, responsibility *may* be fostered, which, in turn, *may* allow for accountability mechanisms to be formalised thus fulfilling Genasci and Pray (2008). There are limitations to the EITI surrounding perceptions, the varying participation of civil society and the role of the public within the Initiative (Aaronson, 2011). Heralded as a ground-breaking success, the reality has not been so positive. Many countries, including the United Kingdom and the United States of America are not yet EITI compliant and the comparatively small number of countries that are committed to EITI suggests that the initiative is not yet mainstream. Other limitations befall the EITI with criticisms typically centring on the fact that the initiative focuses on the revenue streams (and not those affected directly by the extraction industry) and relies on countries willingly participating. For those countries where the greatest 'rents' are being collected are those less willing to engage due to a weak civil society. Developing on this point, the EITI assumes that all governments are equally developed and thus all governments are equally equipped to develop, organise and publicise the requisite documentation. This is not the case and the challenge then that befalls EITI is retaining legitimacy as a soft-law

initiative in spite of these problems. Perhaps this is where the company steps in. In recent years there has been a rise in popularity of the company-community grievance mechanism. In a way, these attempt to fill the gaps left by a weak government system. These company led initiatives are gaining traction within the oil, gas and mining industries for example, BP Azerbaijan (and the Baku – Tbilisi – Ceyhan pipeline) and the Kaltim Prima Coal development in Indonesia. Whereas these are often heralded as a huge departure for stakeholder engagement, some challenges remain; specifically that they require a change in corporate culture, a fundamental shift in stakeholder engagement and conflict resolution (Wilson and Blackmore (eds), 2013).

Scrutiny of the sector has also been intensified with the Equator Principles, which conduct environmental and social risk reviews that relate to project finance. They emerged as a way to manage the concerns of banks – these concerns being similar to those outlined above by Watt (2005) as related to CSR. From EP III, considerably more projects within the sector will be subject to the reporting requirements and to publicly disclose their environmental and social impact analysis. With the advances in the literature on business and human rights (as discussed below) the EPIII also emphasises the responsibility of the sector to move beyond human rights policies toward a much more embedded oversight of human rights impacts on the ground (Conley and Williams, 2011). The Equator Principles show the general trend in shifting towards recognising the role of business in human rights protections but their effectiveness is again questionable.

Aside from these soft-law initiatives, some of the ‘publish what you pay’ objectives outlined in the EITI, for example, are gaining expression as hard law within the US, e.g., s.1502 (supply chain diligence) and s.1504 (transparency provision) Dodd-Frank Act (2010). Forthcoming at EU level is the Accounting Directive (2013), to be implemented at state level from 2016, which will require companies (including the extraction industries) based in the EU to list, project by project, the finances of their operations. This has raised some questions, as some believe that it will be impossible to meet this requirement. Even with instruments, such as those discussed in the section, focussed on global energy extractive industries, the capacity for effective remedy within said instruments (and in company CSR policy) remains questionable. It would appear though that the CSR movement is viewed as the way for business to engage with societal issues. An underexplored area of CSR is the relationship between CSR and a remedy – namely, when the company has done wrong, and has been held accountable – what recourse is there for the victim or affected stakeholder?

### 3. CSR and Remedies

The relationship between CSR and remedies is a tentative one. CSR is more of a defence, or preventative mechanism, a means by which companies can say ‘but look what we *are* doing’ where they are accused of human rights violations. It is one thing to expect a corporation to act in a responsible and ethical manner when it is not costing the company anything, but the question needs to be asked whether a corporation can be expected to compromise on profits to produce responsible good

if competitors are not doing so, and if their shareholders are suffering as a result. For business, a number of ‘priorities’ come to the fore – competition, profit maximisation, and shareholder optimisation, to name a few. For an entity embedded in capitalism – and whose primary goal is profit accumulation – perhaps we need to rethink the expectations from capital accumulation in order to align management language, consumer expectations, and human rights discourse.

Nolan and Taylor (2009) are more sympathetic in recognising the relationship between human rights and CSR. The scope and extent of the relationship between the two is somewhat disjointed and ill-defined due to barriers of language, jargon, and purpose. Even in writing this article, we recognise how we use different terminology to refer to the same roles – one articulating the human rights discourse, and the other that of corporate governance. Nolan and Taylor (2009) suggest it is through the common law that the inclusion of certain rights within the ambit of responsibility is then recognised. Recent developments have been primarily through soft law mechanisms and perhaps it is in respecting soft law (i.e. codes, principles, guidelines, etc.) that corporations are granted a social licence to operate. There is something of a regulatory shortfall here. Soft law lacks the teeth to bite into the real issues but, at the same time, it is arguably allowing corporations to ‘taste’ contentious issues for the first time. Common law and soft law mechanisms can perhaps be used in tandem to foster a more responsible, and accountable, energy extractive industries sector.

CSR can exist as a preventative measure. It is a self-regulatory means allowing corporations to act in a socially manner. The size of corporations and their transnational presence means that there is a regulatory shortfall when these organisations fail to act in a socially responsible manner. There are only limited ways by which nation-states can hold multinational corporations to account. Even when regulations and accountability mechanisms exist, their purpose seems to be to punish the corporation for wrongdoing and not to remedy the victim for loss suffered (FCPA, 1977; Dodd Franks, 2010; Accounting Directive, 2013). CSR, despite its more social justice spin, still does reflect the capitalist orientated background of the concept, in the language used (stakeholder is much more clinical than victim) and the nature of accountability mechanisms. The next subsection looks at the scope of international law as it relates to human rights violations and how this may offer a remedy for affected stakeholders.

## B. International Law and Human Rights

International law has historically been between states, which are treated as subjects with legal personality. Allowing them the power to draft and consent to international agreements that regulate their affairs and relationships with each other it contrasts with domestic law, as it goes beyond the internal affairs of a state to impinge upon the interests of other states and the international community as a whole, such as gross violations of human rights. At least in theory, states can be held responsible

for their actions for violating international law, as well as their inactions where they do not act with due diligence, fail to protect their citizens from private actors, such as MNCs (*Velásquez Rodríguez v Honduras*, 1988), or do not investigate, prosecute, and punish those who commit crimes or enable access to remedies (Art. 146, Geneva Convention, *Osman v United Kingdom*, 1998). Human rights law changes this horizontal regime between states, by protecting the vertical dimension between individuals and the state.

The traditional model of accountability in international law has concentrated on state responsibility, which arises when a state violates an international obligation, such as under an international treaty (Art 2. RSIWA). The state is identified as the principal duty holder, as a party it signs and ratifies international treaties with other states imposing reciprocal obligations. A breach of primary rules under international law by a state is considered a wrongful act, such as invading a sovereign state, requiring the responsible state under secondary rules, i.e. on responsibility, as a legal consequence to cease the breach and provide reparations to any injured state or individual (*United Kingdom v Albania*, 1949; David, 2011; Zegveld, 2001; Art. 33(2) RSIWA; Advisory Opinion ICJ, 2004;). As stated in the *Chorzow Factory* (1928; Art. 31 RSIWA) case '[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.' State responsibility therefore allows for a remedy to be made to an injured party, while also functioning as a condemnation of the State's breach and the 'restoration of the international legality, [and] respect for international law' (Pellet, 2011, p.15).

Responsibility to provide a remedy where a duty is breached is connected to accountability, which is concerned with ensuring that those who are culpable for causing the violation are appropriately sanctioned (Kleffner, 2009, p. 240). For the purpose of reparations this is not punitive, but to hold those individuals or organisation responsible to remedy the harm they have caused. Mallinder and McEvoy (2011) define accountability in broad terms as the constraint of power, with its narrower 'operationalisation' including common characteristics of,

- (1) there is an individual or institution that is capable of being held to account for their decisions, actions or omissions; (2) there is an individual or institution that is empowered to hold the decision-maker accountable; (3) that there is a process by which the decision-maker is required to disclose and explain their decision; and (4) that there is an enforcement process, in which the accountability actor can impose sanctions on decision-makers who violated their duties (p.109).

This understanding of accountability reflects the role of reparations in international law, although the institute that can be held to account as well as the accountability and enforcement mechanisms have traditionally been state-centric. The problem with MNCs is where states are unwilling or unable to hold them to account, no alternative mechanism for redress exists. While states are empowered to hold MNCs as decision-makers to account, their power over the country's economy or access to

resources may prevent a state from doing so. Importantly, no enforcement process that transcends the state exists to make MNCs answerable for their actions both home and abroad.

### 1. The responsibility of MNCs in the international legal order

With the increase of globalisation and growth of MNCs, there is a rising shift away from the traditional state-centric Westphalian conception of subjects and responsibility in international law. Although there is continuing debate as to whether MNCs and other non-state actors can be duty-bearers under human rights, international criminal law has, since the end of the Second World War, held individuals of such corporations responsible for their involvement in international crimes. The Nuremberg Tribunal of leading Nazis distinguished the criminal responsibility of corporations and individuals by stating that '[c]rimes against international law are committed by men, not by abstract entities' (1947, p.223). On this basis a number of individuals have been prosecuted for the involvement of their corporation in war crimes and crimes against humanity (e.g. *United States v Krupp*, 1948; *United States v Carl Krauch*, 1948; *United States v Friedrich Flick*, 1947; *The Zyklon B case: Trial of Bruno Tesch and two others*, 1947). Yet while they may be exempt as an organisation from criminal responsibility, MNCs as legal identities can be responsible for obligations under private international environmental law, in particular regulation which has developed for oil production due to the devastation caused by oil spills, which has generally limited or 'capped' remedies available to external stakeholders (e.g. International Convention on Civil Liability for Oil Pollution Damage, 1969; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution in Damage, 1971; Gauci, 1999).

MNCs can also be responsible for human rights, beyond the 'responsibility to respect' discussed in the next section, to remedy gross violations of human rights. MNCs are not just considered objects of international law to which international obligations are imposed by the state, but can, in addition, be subjects with international legal personality, due to the serious breaches they can commit. By breaching such rules of international law it gives rise to obligations to cease and to remedy such violations (UNBPG, 2005). Following the reasoning of the Nuremberg dictum that 'international crimes are committed by men, not abstract entities', responsibility of MNCs instead exists on the remedial plane. We focus on the remedial corporate responsibility of MNCs. This approach is unlikely to offend the precepts of international criminal justice, but reflects the role of the corporate entity of the MNC as not just responsible individuals, but through their resources, capacity, and/or policies collectively commit or facilitate gross violation of human rights.

### 2. Gross violations of human rights and the responsibility of MNCs

For the purposes of this article we use the following definition of gross violations to include 'genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular

based on race or gender' (Van Boven, 1993, para. 13). These violations cause grave suffering to victims and can also impinge upon economic, social and cultural rights (ESC), as well as amount to gross violations of human rights where such violations of ESC rights take place on a 'large scale or targeted at particular population groups.' (OHCHR, 2012; Zerk, 2014, p. 25-29). It is important to characterise such violations as gross or international crimes to reflect their gravity and severity of harm they cause to victims, so that when individuals or organisations are held to account for such violations it accurately acknowledges the serious suffering of victims (Deva, 2013, p. 97; Zerk, 2014).

The responsibility of MNCs is not absolute or autonomous in international law. The state remains the primary actor and duty-holder in international law, owing to its more permanent identity than MNCs (Kleffner, 2009, p. 265). While governments may change, the identity and responsibility of the state under international law remains the same. The state, general speaking, has greater capacity and willingness to meet international obligations, such as human rights duties to ensure investigations of gross violations and fair trial rights. There is still a role for both private and public actors in remedying human rights violations. In broad terms, the current soft law standards under the Ruggie Principles reflect the authors' position in very diluted terms. It is perhaps through the enunciation of such principles that more binding norms can crystallise into realising the responsibility of MNCs for remedies at the international level.

### C. Bridging the quasi-private/public law divide: The Ruggie Principles

Previous sections of this article bemoaned the regulatory shortfall in monitoring CSR, and the emerging legal personality of MNCs at the international level. Aside from a few select attempts of limited effectiveness, CSR has remained within the confines of the self-regulatory landscape of corporate governance with little codification in international law (Mitchell, 1992; Kaey, 2010; s. 172 (1) (d) Companies Act, 2006; Bradshaw, 2013; Zerk, 2014; Moffett, 2014). At the international level, attempts to regulate MNCs were initiated with the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights (2003). In looking at the human rights element in particular, the identification of responsible actors in respecting human rights is outlined in the Universal Declaration of Human Rights, which recognises the rights of all individuals to be respected by everyone and every entity, without limiting obligations to states (Clapham, 2010, p. 24). The extent to which these rights are enforced is subjective in nature, due, in part, to the inadequacy of the state-centric system. As some states are more powerful and have a greater regulatory reach than others, there is an imbalance in justice when it comes to holding corporations to account. Due to this imbalance (and indeed, fostering the development of this imbalance), multinational corporations can forum shop and move their operations to other jurisdictions. Using a cost-benefit analysis it may be that relocation is a cost effective means of avoiding stringent regulation, enforcement, and remedies. This feeds into work on the 'development of underdevelopment' through reliance on FDI (Frank, 1991). The idea supposes that in trying to

attract and retain capital (and therefore development in the traditional growth indications), the regulatory structure is compromised in order to ensure that capital does not leave the region for a more regulatory friendly region.

There is a gradual shift in the discourse of 'responsibility' for human rights protection. Increasingly, MNCs are viewed as being 'organs of society' with the preamble of the United Nations Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights, '[r]ecognizing [sic] that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights' (Preamble, 2003). For activists, this development presented the opportunity of a more nuanced series of obligations being placed on MNCs (beyond industry standards and multilateral standards such as the UN Global Compact).

The backlash against the Norms, and the subsequent decision by the Secretary General's Special Representative on Business and Human Rights (SRSG), declaring the Norms as not legally binding, raised some broader issues about the legal vacuum in which corporations operate, and indeed the tentative balance between self-regulation via CSR and more sweeping obligations under international law (Ruggie, 2007). The Norms highlighted corporate distaste for positive obligations, as well as emphasising (in the manner in which the Norms were abandoned, (or rethought, depending on your viewpoint)) the disproportionate power and control that MNCs have over state level governments – and perhaps also, international entities such as the UN. The contribution of the Norms to human rights/responsibility discourse lies in the formal recognition of MNCs as international subjects with obligations (although noting that they are not actors). An associated limitation of the Norms, in recognising the MNCs as international subjects, is that they fail to articulate the more fluid and complex relations between states and MNCs, where, states enter into partnerships with MNCs, and concession granting in return for profits and/or lucrative tax revenue streams.

Post 2003 Norms, embedding corporate responsibilities at an international law level has been the task of the United Nations Guiding Principles on Business and Human Rights (Ruggie Principles, 2011). Apparently building on the 2003 Norms, the Ruggie Principles sought to bridge the gap and mend other issues that had been identified in the response to the Norms. In advocating a three pillar approach: Protecting Human Rights (the state duty to protect Human Rights), Respecting Rights (the corporate responsibility to respect Human Rights), and Remedies (the provision of remedies where business have not met their responsibilities or where states have failed in their duty to protect Human Rights); the Ruggie Principles have sought to achieve a common ground between corporate responsibilities and state obligations. In seeking to achieve common ground we believe that the strength of the principles have been significantly diluted, with the winners in the Guiding Principles

being MNCs, and to a lesser extent states, and the losers being those who seek a remedy for the failures of corporate responsibility. The shift in the language used, from

‘transnational corporations and other business enterprises, as organs of society, *are responsible for promoting and securing the human rights set forth in the UN Declaration...*’ (Preamble, 2003, emphasis added)

to ‘[b]usiness enterprises *should* respect human rights. This means that they *should avoid infringing on the human rights* of others and *should* address adverse human rights impacts with which they are involved’ (Ruggie Principles, 2011, Principle 11, emphasis added)

indicates the unwillingness of the UN to alienate MNCs. Indeed, it is this devolution of human rights to market level language that, in essence encapsulates our reluctance to embrace the Ruggie Principles insofar as it offers sufficient remedy to victims. It is interesting to contrast the language used in the Ruggie principles with earlier work from Ruggie (Ruggie, 2007; Kytte and Ruggie, 2005). By subsuming voluntary language into required obligations (i.e. the pillars) the value of the Ruggie Principles seems to lean pro-market as opposed to protecting victims. As a result, this approach comes at the expense of accountability, in terms of victims’ access to redress and the enforcement of remedies. The shift in language is more akin to the principles approach advocated by CSR, as opposed to the more positive obligations that bind other actors in international law. Whereas many arguments are put forth elsewhere on the need for this compromise (Ruggie, 2007), the detrimental impact in access to remedies must not be overlooked.

The Ruggie Principles (2011) dedicate a section to remediation and access to remedies within Principles 22 to 25 (inclusive). Principle 22 notes that, ‘[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.’ Again, it is interesting to note the use of ‘should’ as opposed to language suggesting a more positive obligation, such as ‘must’ or ‘shall’. In articulating the access to remedy, Principle 25 notes, that ‘[a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy’ (Ruggie Principles, 2011). This in itself presents an issue as placing a subsidiary responsibility on the state to provide remedy, or to ensure that a remedy is enforced. Even aside from that, as we noted above, in the extraction industry, one of the key issues is that the governments collecting ‘rents’ from corporations tend to be ‘weaker’ due to systemic limitations and there tends to be a weaker civil society to encourage government’s to participate. In enforcing remediation on states, those most affected (communities in lesser developed areas) may be those less able to use state frameworks to seek a remedy.

In terms of remedies themselves, the Ruggie Principles incorporate the language of human rights conventions of ‘effective remedy’. The principles themselves are silent on reparations as a means of ensuring an effective remedy. It is only in the additional commentary by Ruggie himself which



articulates the types of reparation that ‘may’ be appropriate, such as ‘apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, e.g., injunctions or guarantees of non-repetition’ (Commentary on Principle 25) These types of reparations, while more expansive than traditional private law remedies, do not reflect the entire position in international human rights law of also including acknowledgement of responsibility, memorials, and investigations. It is these types of reparations that go towards the more public accountability of MNCs (UNBPG, 2005). Furthermore, remedies will only be effective through monitoring and enforcement at the regional or international level to ensure states are allowing individuals and communities to access redress against responsible MNCs, rather than as monetary leverage on vulnerable groups.

The experience of state compliance before the International Criminal Court indicates that having legislation and domestic mechanisms to hold private actors to account, albeit for individual criminal responsibility, is not always effective in ensuring accountability owing to weakness of the state, whether through its inability or unwillingness (Moffett, 2014). The Ruggie Principles place too much faith in states to ensure MNCs provide remedies to victims, or the state itself to provide redress where corporations are unable to do so. A more effective way to ensure victims have access to a remedy for gross violations of human rights would be an international mechanism to act as a court of last resort where states are unwilling or unable to provide a remedy to victims. This would also help alleviate concerns that perceived ‘weaker’ governments are less equipped to drive an effective remedial agenda at state level. The experience of regional human rights courts evinces the need for such an additional level of accountability. The new protocol of the African Court of Justice and Human Rights for an International Criminal Law Section provides for corporate responsibility and reparations, reflecting African concerns for justice for victims against MNCs (Art. 46, Protocol on Amendments, 2014).

The Ruggie Principles do provide for National Contact Points (NCP) being utilised to enforce the principles. The NCP is defined as ‘a government office responsible for encouraging observance of the Guidelines in a national context and for ensuring that the Guidelines are well known and understood by the national business community and by other interested parties’ (National Contact Points for the OECD Guidelines for Multinational Enterprises). Although referring specifically to the OECD Guidelines framework, there is some application here with regard to Ruggie. Whilst recognising the perceived importance of the NCP, we would stress how a country’s individual needs can perhaps impact on the manner in which they ‘commit’ to such guidelines. This is of course difficult to gauge, especially giving the lack of monitoring of compliance and enforcement of international laws at the national level. In short, the value of the NCP seems to lie more in the publicising of the standard as opposed to ensuring compliance or to the enforcement of the remedial aspect of the principles (Aaronson and Reeves, 2002).

There is also a disparity in the effectiveness of the NCP and the reports that arise as a result of investigations. Addressing the numbers of reports in relation to the OECD Guidelines for example, it becomes clear that the value of the NCP does differ depending on the state viewpoint. If then, there exists a disconnect in the use of the NCP on a transnational level, the effectiveness of the NCP as a means to hold MNCs accountable, or indeed to enforce remedies can be questioned. The Ruggie Principles, in contextualising the three pillars, particularly remedies and enforcement, within the framework of the NCP has diluted the potential for obtaining remediation, but also the potential of the principles themselves.

The Ruggie Principles were designed with compromise in mind. Intent on bringing together business and governments, the Ruggie Principles sought middle ground, which, although gaining support from huge numbers of stakeholders, has stagnated the potential of the rights, responsibility and accountability discourse. The failure to articulate a strong framework for remediation, independent of the NCP, has diminished the potential of the principles as a viable mechanism to protect affected stakeholders/victims (Deva, 2013). The value of the principles therefore lies in raising awareness of the need for effective remedy when corporations fail to adhere to their responsibilities. The enforcement of these remedies seems to lie beyond the remit of the existing UN framework. This is not to say that victims have received no remedy, numerous groups have initiated litigation against MNCs for failure to adhere to their responsibilities. The success of such litigation is limited (Zerk, 2014). Lessons of accountability can be learnt from public international law in grasping the responsibility of MNCs beyond national borders.

### **III. Bridging the Private-Public Law Remedial Divide**

#### **A. Public law remediation and the energy extractive industry**

Public international law, in contrast to private law, is concerned with the obligations imposed on the state. Human rights law, in particular, has over the past two decades developed the notion of positive obligations on states to protect individuals, as well as to ensure mechanisms that can effectively investigate and remedy violations of human rights, even where they are committed by private actors. As distinguished in the Ruggie Principles, the overriding principle is that the state is responsible for providing access to remedies to victims where private businesses commit abuses (Principle 25). As noted above, the Ruggie Principles, while not going as far as to find MNCs have human rights obligations, they recognise a responsibility to respect human rights and to provide remediation, or at least cooperation in such processes. Yet as Zerk (2014) points out, a lack of certainty and clarity on key issues of corporate responsibility for gross violations of human rights, despite the Ruggie Principles, encourages adversarial domestic civil proceedings and limits the effectiveness of litigation as an avenue to remedying such harm for other victims (p.60). As the current international regime

stands, only those victims of state abuses can claim reparations, despite comparable violations committed by non-state actors.

Regional human rights courts have in a number of cases found states in violation of individuals' or communities' rights, despite the role of MNCs in contributing or committing such violations. The responsibility of the state reflects its obligations under the principle of due diligence and its failure to satisfy positive obligations to ensure the rights of those within its jurisdiction. Enforcement of human rights obligations on states for violations contributed by MNCs in the energy extractive industry raises three relevant points on redressing gross human rights violations as part of an accountability framework: (1) reparations; (2) legislation; and (3) enforcement mechanisms.

First reparations, rather than just compensation, are central in decisions in holding the state to account for its positive acts or failure to exercise due diligence to prevent such violations. Reparations serve to acknowledge the harm suffered by the injured party, by making the responsible party provide measures to remedy the harm caused. The traditional civil litigation approach in seeking damages against MNCs does allow victims the flexibility to spend the money as they see fit, as Grotius (1625) states 'money is the common measure of valuable things.' Yet damages can be insensitive in redressing gross violations of human rights, as it can be perceived as 'blood money' and reduces the value of human life and dignity to 'homo oeconomicus' (*Loayza Tamayo v Peru*, 1998, para. 9). Where states have been found to commit gross violations of human rights, regional human rights courts do order them to provide compensation, as well as restoration of the environment, measures of satisfaction such as acknowledgements of responsibility, and guarantees of non-repetition (Shelton, 2005, p. 9 & 65; UNBPG, 2005; *Río Negro Massacres v Guatemala*, 2012; *SERAP v the Federal Republic of Nigeria*, 2012, paras 113-121). This broader construction of remedies beyond compensation is necessary to effectively repair the harm caused, going beyond the individual and monetary expense, to recognising the impact upon the environment and the long-term living standards of communities. Integral is the public acknowledgement by the responsible party for its wrongdoing, and is usually made with an apology to those affected (*Kichwa Indigenous People of Sarayaku v Ecuador*, 2012).

Orders against a state can be complemented by reparation programmes engaged with by non-state organisations, reflecting the responsibility of both groups in contributing to the violations suffered by victims. For example, in the *Rio Negro Massacre v Guatemala* case (2012), state forces between 1980-1982 massacred over 440 members of the Rio Negro community who refused to move off land that was later flooded as part of the Chixoy Hydroelectric Dam (sponsored by the World Bank and the Inter-American Development Bank). The dam's reservoir destroyed the community's homes and sacred sites (Los Encuentros), forcibly displacing and reducing them to poverty in a deprived part of the country. The Inter-American Court ordered the state to compensate the victims, to provide

infrastructure and basic services to the surviving members of the community, such as food security, potable water and sewage system, schools and healthcare centre, specialised medical care, as well as to rescue and preserve the Maya Achi culture, and make a public acknowledgement of the state's responsibility. To complement this order in January 2014 the US Congress passed the 2014 Consolidated Appropriation Act, which requires the World Bank and Inter-American Development Bank to report on their implementation of the 2010 Reparation Plan claimed by the Rio Negro community (April 2010 Reparation Plan for Damages Suffered by the Communities Affected by the Construction of the Chixoy Hydroelectric Dam in Guatemala). Such approaches reflect the complementary responsibility of the state and non-state actors for remedies of gross violations of human rights.

Where violations have been committed by MNCs that affect communities, or armed groups have destroyed MNCs' oil pipelines, regional human rights courts have held the state responsible for remedying the harm caused, reinforcing the state-centric compliance model found in international law. Moreover, rather than a criminal justice approach, such responsibility is based on negligence of the organisation, instead of intent, capturing wider causation and conduct of such organisations. In the *SERAP* case, involving leaks and explosions from oil pipelines in the Niger delta, claimants from a number of communities brought proceedings against Nigeria before the ECOWAS Community Court of Justice. The court declined to order the \$1billion in damages sought by the victims, due to the large number of victims affected, who could potentially number in their hundreds of thousands. The court instead ordered the state to take all effective measures to restore the environment in the Niger delta, prevent the recurrence of such damage to the environment, and to hold the perpetrators responsible for such damage (*SERAP v the Federal Republic of Nigeria*, 2012, paras 113-121; UENP Report, p. 207-213; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, 2001).

The Inter-American Court of Human Rights in the *Sarayaku* (2012) case took a more prescriptive approach. Here, a state partnership with a private oil company carried out oil exploration on the Sarayaku people's land without consulting them or obtaining their consent. Using explosives to explore possible oil reservoirs, the company destroyed sacred sites and contaminated their water supply. Numerous unexploded ordnance remained on their land, causing the Sarayaku to cancel their annual festival and livelihoods in order to protect their land. The Court recognised the Sarayaku people's intrinsic spiritual connection with the land was necessary to protect their physical and cultural way of life. On the basis of restitution the state was ordered to recover over 1,300kgs of explosive left on the Sarayaku People's land, amongst other reparations (*Kichwa Indigenous People of Sarayaku v Ecuador*, 2012, paras 289-295; UN Human Rights Committee Communication, 1984). Although not holding the private corporation to account, the Inter-American Court's decision would bind the Ecuadorian state's future engagement with corporations in the oil industry ensuring that

vulnerable communities are effectively protected both in consultation and consent in how their land is used in the future (*Delgamuukw v British Columbia*, 1997, para 168).

The willingness of the Inter-American Court, to move the boundaries of the law to reflect the lived reality of individuals and communities, in how gross violations of human rights impact onto their way of life, and spiritual and cultural connection with the land, and is an important contribution to protecting such vulnerable groups. Reparations awarded by regional human rights courts, as with all court judgments, are generally limited to those victims who can bring claims before them. Unless there is a class action which represents all victims, some individuals are likely to be left without any reparations, in particular those victims of violations committed only by MNCs, requiring more of a general commitment at the domestic level of states to create effective domestic remedial mechanisms.

Second, human rights courts have held that passing legislation to protect individuals' human rights and the environment is insufficient by itself, but requires a commitment to ensure access to effective remedies to victims and prosecution of those responsible (*Kichwa Indigenous People of Sarayaku v Ecuador*, 2012, para. 301). As stated by the ECOWAS Community Court of Justice,

...adoption of the legislation, no matter how advanced it may be, or the creation of agencies inspired by the world's best models, as well as the allocation of financial resources in equitable amounts, may still fall short of compliance with international obligations in matters of environmental protection if these measures just remain on paper and are not accompanied by additional and concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered. (*SERAP v the Federal Republic of Nigeria*, 2012, para. 105)

Such needs for those individuals and communities affected in the Niger Delta by oil companies are apparent in the continuing litigation by the Bodo community against Shell (*The Bodo Community v Shell*, 2014). Suggesting a wider challenge for the law to effectively capture the experience of such violations to victims and to redress the harm caused by MNCs, there is a need for both effective regulation and enforcement measures to ensure compliance with human rights law and to prevent repetition of violations, of which legislation is key.

Third, international or regional mechanisms are needed to monitor compliance of states with human rights obligations and to offer an alternative forum for redress for victims where they cannot access an effective remedy domestically, owing to the state's unwillingness or inability. MNCs are created to make profit and to promote private interests, thus self-regulation by companies' compliance with human rights norms is likely to be ineffective, as with CSR, as it is likely to be used to assist the company's business rather than social protection (McCorquodale, 2009, p. 391 & 394). In contrast the state is supposed to protect its citizens and promote public interests, but due to its inability or unwillingness, such as economic interests in maintaining MNC investment, does not always enable individuals to seek or enforce remedies against MNCs. Nevertheless, the risk of a state being brought before a regional human rights court and found responsible for violating individuals' human rights

and ordered to provide reparation, could be a strong incentive on states to establish remedial mechanisms that can allow individuals to seek reparations from MNCs. Such regional courts by their nature do not have universal jurisdiction, with their scope only emerging in continents such as Africa, or little or non-existent in Asia-Pacific, the Middle East, and North America. Perhaps a quasi private-public law approach is required in holdings MNCs to account for gross violations of human rights.

#### B. An international court of reparations: A halfway house?

MNCs are responsible actors under international law, due to their role in gross violations of human rights. Individuals of MNCs can already be criminally responsible for international crimes at the international plane, and so should the corporate body, where their actions and omissions contribute to such violations. Remedies in human rights law are not punitive in contrast to some private law jurisdictions, but are meant to remedy victims' suffering. Reparations can more indirectly deter MNCs from committing violations in the future through due diligence so as to avoid the 'cost' of future awards. Such a position bolsters the normative obligations of human rights beyond states, rather than the diluted language under the Ruggie Principles of 'responsibility to respect' and 'impact' (Deva, 2013). Perhaps the distinction between negative and positive obligations under human rights law could be useful in delineating the remedial responsibility of MNCs. Negative obligations involve a party to refrain from engaging in certain activities, such as torture, whereas positive obligations require them to carry out some activity or institution building to prevent violations occurring. As such, negative obligations can apply to both state and non-state actors, whereas due to the permanence, capacity and identity in international law of the state it is better situated and accountable to fulfil positive obligations. For MNCs that commit gross violations of human rights, their responsibility to provide reparations could be directly invoked against them, rather than responsibility for such violations resting on the state.

Despite the commentary accompanying the Ruggie Principles (2011) stating that businesses are likely to be legally implicated in gross violations of human rights given the 'expanding web of potential corporate legal liability arising from extraterritorial civil claims' (Principle 23, Commentary, 2011), there remains numerous difficulties in civil litigation. Notwithstanding the aspirational nature of the Ruggie Principles, the enforcement of human rights obligations remains on states. As Nolan and Taylor note, MNCs are 'able to operate largely in a legal vacuum, devoid of obligations at the international level' (2009, p. 437). Although individual members of MNCs who directly or indirectly acted perpetrated or facilitated international crimes can be held to account theoretically before the ICC, there have been so far no such cases before the Court. A similar mechanism for the responsibility of MNCs in providing remedies does not currently exist in international law. Given the difficulty in establishing the responsibility of an individual to the criminal standard of beyond reasonable doubt, in comparison to civil law of balance of probability, an international remedial body could allow violations to be easier proved.

A halfway house of an international court of reparations could be an effective way of developing universal jurisdiction and remedy for violations committed by MNCs, being based on quasi-private/public law principles so as to closing accountability loopholes and barriers that exist in domestic jurisdictions. Such a court could encourage the development of great clarity and consistency in domestic law and ensure compliance with international principles through monitoring and determination in contentious cases where states are unable or unwilling to hold those responsible to account. This is a gargantuan challenge to develop rules of evidence, procedure and substantive law that can reconcile disparate domestic legal regimes and rules, which would require domestic ratification of any possible international treaty to establish such a court. As aspirational such a court may be, it is not impossible, as the International Criminal Court has shown with international criminal law. This approach is conceivably naive given the complex negotiations and interests involved in reaching the compromise position of the Ruggie Principles.

The suggestion of an international mechanism of redress is unlikely to be met warmly by MNCs or states who wish to retain their control over such issues. Nonetheless, given the almost insurmountable challenges in holding MNCs to account and diversity of legal jurisdictions, there is a need to recognise that the current state-level implementation of obligations is insufficient. This lacunae may lead to the underdevelopment of national laws and regulations as legal forum shopping becomes the norm in an endeavour to compete, attract, and retain investment in an increasingly competitive capitalist market. In addition, this article has noted that those countries with the most resources in terms of the energy extraction industry tend to be historically lesser-developed regions. An international court of this level would be a means to ensure individual protection without exploitation whilst at the same time offering an avenue for the development of development in terms of a national framework of laws, regulations and policies.

An international reparations court would need to be based on a treaty, such as the Rome Statute of the International Criminal Court, to ensure a wide consultation and deliberation by states and non-state organisations on its legal basis and competence. This treaty would follow on from the Ruggie Principles by providing an enforcement model to emerging norms in holding MNCs accountable. Such a court would require investigative powers to determine if violations occurred and determine who is responsible, parties to proceedings would include states, MNCs, victims with other interested parties to provide *amicus curiae* to assist the work of the court. The *ratione materiae* of such a court would be wider than ICC, to encompass not just international crimes, but gross violations of human rights. Given the problems in holding non-state armed groups, the court could also hold them responsible for serious breaches of international humanitarian law. For developing states such a court could enable capacity building of domestic practitioners and legal regulation, through the cooperation of other member states, and improve their bargaining power position with MNCs. For developed states where parent companies of MNCs originate and have shares on the stock exchanges, the treaty

could be a bulwark against undue pressure on their economy. For MNCs, engagement and adherence with such a court would ensure they take the management of the organisation in respecting human rights obligations seriously, and are willing to accept responsibility and remedy it where they cause harm. For victims, it would overcome weaknesses in domestic civil litigation to improve the universality and consistency of justice against MNCs. For all parties involved, it would ensure greater certainty, coherence and consistence in the regulation of MNCs. The African Court's International Criminal Law Section represents willingness amongst some states to ensure such an avenue for redress.

We accept that what we are proposing in this article is ambitious. An international mechanism to hold MNCs to account for reparations is only the first step in shaping the regulatory structures that monitor corporate behaviour beyond nation state relations. This article has referred to 'inter'-national regulations and mechanisms. The term 'international' suggests some interaction between states (and indeed, this is something generally accepted in the literature). The MNCs that we are seeking to hold accountable are not 'inter'-national. They owe no loyalty to a particular state, region, people, or culture (Backer, 2007-2008; Sklair, 2001). Instead, the purpose of their existence is to make profit. They are transnational entities with relationships *beyond* state interplay, and indeed, states exist as mere external stakeholders. This in itself is not a negative, but recognises the limitations in influence that a state can have over corporate behaviour (Mitchell et. al., 1997).

In terms of characterising governance development, there exists a pathway from regional- national – federal – international – transnational – global. Perhaps an international court of reparations and universal implementation of legislation to affect it in domestic courts could connect these governance pathways. We have stated throughout this piece that whereas the drivers of the global economy and governance discourse are MNCs (and thus operating at a transnational level), the regulatory mechanisms in place to regulate corporate behaviour are grounded at the predominately national/federal stage (Chimni, 2007). Responsibility without accountability, via effective laws and sanctions, is an empty vessel. Responsibilities, before the mechanisms by which to hold them account have caught up, are irrelevant. We are proposing that the international level of regulations needs to be more robust in order to develop effect trans- or global – regulations, which are, ultimately the end goal in ensuring accountability and remediation for failure to adhere to obligations and responsibilities.

#### **IV. Conclusion**

This article focused on the failure of existing private and public legal frameworks in providing an effective remedy for victims/affected stakeholders where corporations violated either human rights, or indeed their own responsibilities as articulated in their CSR policy. Using the energy extraction



industry as a vehicle to discuss this issue, we considered the value and scope of more integrated engagement with reparations on an international level. Initially looking at the responsibilities that corporations place on themselves via CSR we then considered its limitation in providing a remedy.

In terms of international norms and obligations, significant developments have been made in holding individuals within corporations to account from a criminal perspective. There have been less profound developments from a civil viewpoint. The Ruggie Principles (2011) evince the potential of a UN level guidance on responsibilities. Ruggie, in seeking to build consensus on the 2003 Norms, compromised on victims' right to remedy. This is not to say that litigation against the extraction industry does not exist. Mass torts and ATCA litigation, and the relative success in securing settlements (albeit no apologies etc.) are more a testament to the innovation of the human rights activists, than to the existing mechanisms in place by which to hold corporations to account (Zerk, 2013). Although having provided some redress for victims/affected stakeholders, pathway to recovery has been severely limited in recent times with the decision in *Kiobel* (2013), in addition to procedural, jurisdictional and evidential limitations.

The changing nature of power and wealth in global terms, and the role MNCs can play in gross violations of human rights, reinforces the need to reconceptualise the traditional state-centred nature of responsibility in international law. Given the limited space for victims or external stakeholders of such violations seeking redress domestically, the international legal order may be a more efficient way of achieving accountability. Such a move perhaps also suggests taking the responsibility of MNCs more seriously, moving away from corporations defining the confines of responsibility and obligations on their terms, by bringing them into the fold of international responsibility and external accountability. In doing so, we believe that it would also recognise the shifts in the governance structure; recognising the limitations of using state level laws to hold multinational entities to account.

This is not to substitute state obligations under international law or indeed its role and importance in protecting individuals and communities in its jurisdiction and upholding the public interest. Instead the state remains a guardian of society, with our suggested international court of reparations acting as a last resort where the state is unable or unwilling to provide victims access to remedies for gross violations of human rights. Responsibility for gross violations of human rights is conceived more pluralistically, including states and MNCs, with a subsidiary role of the state to provide reparations to victims where MNCs are unable to do so. Nor does such a scheme negate individual criminal responsibility for individuals within MNCs, where such gross violations satisfy the more narrowly defined international crimes. For victims of gross violations of human rights, recognising their legitimate claims to redress committed by MNCs as an international concern that should be effectively remedied, also broadens the notion of accountability, beyond the concern of individual states, to an international and universal one. By bridging the private-public divide, through

recognising the responsibility of MNCs to provide remedies for gross violations of human rights, it could potentially offer an appropriate way of holding MNCs to account and to repair the harm caused in our endless pursuit for energy. Looking forward, how can we build on the Ruggie Principles to ensure justice for victims? An international court of reparations and universal jurisdiction over the responsibility of MNCs in domestic courts is potent way to make accountability meaningful.

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